

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
)	00-0393
Proposed Implementation of High Frequency)	
Portion of the Loop (HFPL) / Line Sharing Service)	

**REPLY TO BRIEF ON EXCEPTIONS ON SECOND REHEARING
OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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The Staff of the Illinois Commerce Commission (hereafter “Staff”), pursuant to Section 200.830 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Admin. Code 200.830, as its Reply to Briefs on Exceptions herein, states as follows:

1. THE PROPOSED ORDER HAS CORRECTLY SET INTERIM RATES PURSUANT TO 13-801(g) SINCE AMERITECH IS INCORRECT IN ARGUING THAT THEY SUFFERED A DUE PROCESS VIOLATION and THAT INTERIM PRICES WOULD BE BASED ON UNSUBSTANTIAL EVIDENCE

Ameritech incorrectly argues that interim rates were set in the absence of due process and lack of substantial evidence. In its Brief on Exceptions (“BOE”), Ameritech rests its due process claim on the fact that some of the parties agreed not to address permanent pricing, and therefore it had no notice that interim prices were to be set, Ameritech BOE at 17, and was given no opportunity to present their case before new duties are imposed upon it, Ameritech BOE at 18. Further, Ameritech argues that any prices established by the Commission would be arbitrary and capricious since the rates lack substantial evidence, as required under Section 10-201(e)(iv)(A) of the Public Utilities Act (“PUA”). Ameritech BOE at 18.

Due Process

Ameritech presents no new legal arguments in its Brief on Exceptions regarding due process. In arguing that it lacked sufficient notice that pricing would be addressed and therefore had no opportunity to make its case, Ameritech is mistaken. As Staff argued in its Initial Brief, Ameritech has had sufficient due process in this proceeding. It

received sufficient notice of pricing issues, and opportunity to be heard. Staff IB at 20-24. The parties focus on cost testimony during the entire proceeding was sufficient notice for Ameritech that it was of issue. See Staff IB at 15-24. Further, Ameritech had the opportunity to argue its case, to cross examine Staff's witness, and did address pricing issues on pages 5 and 6 of its *Reply Brief in Support of Surreply to Staff's Brief on Exceptions*. Moreover, Ameritech provided the cost studies related to the Broadband Service, Ameritech Ex. 2.0 at 2-3, and does not deny that fact. Therefore it cannot argue that additional information is needed to set prices. See Staff IB at 15-20.

Substantial Evidence

Ameritech misapplies Section 10-201(e)(iv)(A) of the PUA to this proceeding, since there is substantial evidence upon which the Commission can set interim prices. Section 10-201(e)(iv) of the PUA states that:

(iv) The [reviewing] court shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:

- A. The findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such rule, regulation, order or decision; or. . .

220 ILCS 5/10-201(iv).

As Staff argued in its initial brief, the prices were set based on substantial evidence in the record. Staff IB at 15-20. Substantial evidence has been defined as :

Evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but maybe somewhat less than a preponderance.

Central Ill. Public Service Co. v. ICC, 268 Ill. App. 3d 471, 479 (4th Dist. 1994); *see also Atchison T. & S.F. RY. Co. v. ICC*, 335 Ill. 624 (1929).

“Under the substantial evidence standard, the substantial evidence may support more than one possible finding, and possibly even several.” *Id.* The evidence only need be such that a reasoning mind would accept the evidence as sufficient to support a particular conclusion. *Id.* Therefore, due to the technical issues, a reviewing court would defer to the expertise of the Commission, *id.*, in determining which conclusion is best.

The evidence admitted into the record that supports prices for Project Pronto is far in excess of “a mere scintilla.” Ameritech witnesses Cheryl Ann Mears and Christopher Cass provided direct testimony, with cost studies, and rebuttal testimony to the adjustments Staff witness Robert Koch proposed. Ameritech Exs. on Rehearing (Mears) – 7.0, 7.01P, 7.02P, 7.1, 7.1P; (Cass) – 12.0, 12.0P, 12.1. The cost studies were in response to a question from the Commission. Staff IB on 2d Rehearing at 16. The cost studies provided both recurring and nonrecurring costs for the Broadband Service prices. See Ameritech Exs. 7.0 at 4-6; and 12.0 at 2. Staff witness Torsten Clausen found that the Next Generation Digital Loop Carrier Unbundled Network Element (“NGDLC UNE”) Platform would be sufficient for the time being, and the cost studies provided by Ameritech for its Broadband Services offering contains all of the same cost elements as the NGDLC UNE Platform. Staff IB on 2d Rehearing at 18. Staff witness Koch evaluated the cost studies filed by Ameritech and proposed changes. Staff Ex. on 2d Rehearing 2.0 at 14, 17, 20.

Finally, Ameritech witnesses filed rebuttal testimony responding to Mr. Koch's recommendations, and provided additional responses to the Commission as an attachment to its initial brief. Ameritech, also, provided comments on the interim pricing issue in its *Surreply to Staff's Reply Brief on Exceptions*, at 8-9 (filed Sept. 10, 2001), and its *Reply Brief in Support of its Surreply to Staff's Reply Brief on Exceptions*, at 5-6 (filed Sept. 17, 2001).

Application of Section 13-801(g)

Staff maintains that the Commission has authority under 13-501(b) to impose an interim tariff in this proceeding since Ameritech has had an adequate hearing, as part of the order in the case, See Staff IB at 10-25; see also Covad IB at 49-50, despite the Proposed Order's finding that Ameritech "has not had its full day in court on the issue of costs based rates", Proposed Order at 25. As discussed in Staff's Initial Brief, and above, Ameritech cannot argue that it did not have notice that prices were at issue considering it provided direct and rebuttal testimony on costs, had the opportunity to cross examine Staff witness Koch, did not object to the admission of his testimony, and addressed pricing issues in its reply brief on exceptions, surreply and reply brief in support of its surreply. Staff also agrees with the CLECs that the Commission also has authority under 13-801(g) to impose interim rates in the absence of permanent cost based rates. See Covad IB at 49-50.

Section 13-801(g) states:

The immediate implementation and provisioning of interconnection, collocation, network elements, and operations support systems shall not be delayed due to ny lack of determination by the Commission as to the

cost based rates. When cost based rates have not been established, .within 30 days after the filing of a petition for the setting of interim rates, or after the Commission's own motion, the Commission shall provide for interim rates that shall remain in full force and effect until the cost based rate determination is made, or the interim rate is modified, by the Commission."

Section 13-801(g).

Ameritech argues that Section 13-801(g) "is merely a tool to hasten the implementation of interconnection and network unbundling requirements." Ameritech BOE at 19. While Staff agrees with Ameritech that 13-801 is a tool given to the Commission by the legislature to hasten the implementation of these various requirements, Staff contends that Ameritech's position actually supports the Commission's authority, and arguably its duty, under Section 13-801(g) is to provide for the immediate implementation and provisioning of interconnection, collocation, network elements, and operations support systems. 220 ILCS 5/13-801(g). Certainly, the legislature mandates that such implementation "shall not be delayed due to any lack of determination by the Commission as to cost based rates". *Id.* The statute specifically provides that [w]hen cost based rates have not been established . . . the Commission shall provide for interim rates that shall remain in full force and effect until the cost based rate determination is made, or the interim rate is modified, by the Commission." *Id.*

Thus, if the Commission does not accept Staff's argument that Ameritech had notice and a hearing and satisfied the requirements of Section 13-501(b), Staff nevertheless agrees with the Proposed Order that the Commission has authority under Section 13-801(g) to establish interim rates without a hearing. The plain meaning of the statute mandates the Commission to set interim rates even if they are not cost based. Section 13-801(g) states that "the Commission shall provide for interim rates that shall

remain in full force and effect until the cost based rate determination is made, or the interim rate is modified, by the Commission”. *Id.* Moreover, implementation and provisioning of network elements necessitates establishing pricing. Ameritech cannot claim that it was unaware that pricing would be necessary to implement and provision network elements. Clearly, the Commission has the authority to establish interim rates based on the cost evidence in this docket.

Accordingly, the Proposed Order correctly decided that Section 13-801(g) of the PUA grants the Commission the authority to establish interim rates for Project Pronto, when cost based rates have not been established. *Proposed Order* at 25.

2. SHARED AND COMMON COSTS FOR INTERIM RATES SHOULD BE BASED ON THE COSTS APPROVED IN DOCKET No. 98-0396

In its BOE, Ameritech takes exception to the Proposed Orders finding that the markup for shared and common costs be based on Docket No. 00-0700, and instead proposes that the markup be based on the costs approved in Docket No. 98-0396. Ameritech BOE at 20. Staff believes that the most recent determination of shared and common costs should be used. Since the NGDLC UNE platform is a UNE, it appears that Docket No. 98-0396 is the most recent proceeding in which the Commission approved a shared and common cost factor for Ameritech, those should be used.

3. REFERENCE TO DOCKET No. 00-0393 SHOULD REMAIN IN SECTION 16.2

Ameritech, in its BOE, argues that the reference to Docket 00-0393 should be deleted from Section 16.2. If the Commission finds that the completeness of the audits for those OSS databases listed in the *Line Sharing Order*¹ are questionable, Staff disagrees with Ameritech's proposal, and recommends that the reference to Docket No. 00-0393 remain in Section 16.2 of the Interim Tariff.

Staff, in its Initial Brief, stated that the reference to Docket 00-0393 in Section 16.3 should be deleted "since the CLECs have performed audits on the [systems Ordered by the Commission in Docket Nos. 00-0312/00-0313] for the purpose of determining what data is useful, then the Commission directive has been fulfilled." Staff IB at 8. In light of Ameritech's reliance, in its BOE, on Staff's arguments in its Initial Brief, Staff needs to make clear that Staff accepts the Proposed Order's finding, since the completeness of the CLECs audit is questionable, *Proposed Order* at 78.

Staff initially proposed the reference to Docket No. 00-0393 be added to Section 16.2 in Staff's *Surresponse on Rehearing* in Docket No. 00-0393. Staff proposed that the reference to Docket No. 00-0393 be added since the audit was ordered in the *Line Sharing Order* at 65-66. *Surresponse on Rehearing of Staff*, at 6. As Staff stated in its initial brief in the *Line Sharing Rehearing*, an ILEC is required to provide access to information in the backend systems, but not required to provide unmitigated direct access to those systems. Staff IB on Rehearing, at 40. Specifically Staff argued that "an ILEC must provide the requesting carrier with non-discriminatory access to the same detailed loop qualification information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about

whether the loop is capable of supporting advanced services equipment the requesting carrier intends to install.” Staff IB on Rehearing, at 40 (citing *UNE Remand Order*² ¶427)(emphasis added). In amending the CLECs Proposed Interim Tariff Language, Staff advocated the continuation of the audit provision of the *Line Sharing Arbitration Order*, Docket 00-0312/00-0313. *Surresponse on Rehearing of Staff*, at 6. The benefit of the audit is that it furthers the Commission’s Order in the *Line Sharing Arbitration Order*, Docket 00-0312/00-0313, as well the Commission’s order in the *OSS Order on Rehearing*, by granting CLECs the ability to determine what information Ameritech has access to. *OSS Order on Rehearing* in Docket No. 00-0592 at 10-12, and 45-52 (Aug. 9, 2001).

The Commission in the *OSS Order* in Docket No. 00-0592 stated that CLECs “should have full and unmitigated access to any and all information within the Ameritech Legacy systems when that information is necessary to determine what services CLECs can market to its customers.” *OSS Order*, Docket No. 00-0592 at 82 (Jan. 24, 2001)(hereafter “*OSS Order*”)(emphasis added). The Commission has ordered that all CLECs should know the results of the audits of Ameritech’s OSS databases (thereby knowing what type of information Ameritech has in its databases, and the form in which it is kept) authorized in Docket Nos. 00-0312/00-0313 so that each CLEC can independently determine that it continues to have access to the information necessary to provision xDSL service that Ameritech can access.

¹ *Line Sharing Order*, Docket No. 00-0393 (March 14, 2001) (hereafter “*Line Sharing Order*”).

² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238 (rel Nov., 5, 1999) (hereafter “*UNE Remand Order*”).

Since the Proposed Order questions the completeness of the audit, the CLECs have not received the benefit of the audit as ordered by the Commission in Dockets 00-0312/00-0313, and in the *Line Sharing Order*, Docket 00-0393 at 65-66. Consequently, Staff's justification for deleting the references to the audits is no longer sound. See Staff IB at 8-10 (arguing that since the audits were complete they were no longer needed). Since CLECs are entitled to nondiscriminatory access to information, *UNE Remand Order* ¶430; *OSS Order* at 82, if the Commission finds that the completeness of audits for those systems is questionable, then Staff recommends that the reference to Docket No. 00-0393 remain in Section 16.2.

4. SECTION 16.3 OF THE INTERIM TARIFF SHOULD BE DELETED

Ameritech, in its BOE, argues that Section 16.3 should be deleted. Staff agrees with Ameritech, but for different reasons.

Ameritech argues that Section 16.3 should be deleted for the reasons Staff set forth in its Initial Brief, at 10, and because there is a cross-reference to databases listed in Section 16.1 which no longer exist. Staff supports deleting Section 16.3 only if Staff's proposed changes to Section 16.1 are implemented, thereby making Section 16.3 redundant. Staff is not proposing deletion of Section 16.3 as a result of any substantive change in position.. Section 16.1, as proposed by the CLECs listed all the databases to be audited as was approved by the Commission in Docket Nos. 00-0312/00-0313. Staff removed that list since CLECs are entitled to unfiltered access to the same information that is available to Ameritech. *Staff Surreponse on Rehearing* at 6 (Sept. 14, 2001).

Therefore, if more databases are developed, the CLECs should have access to the same information in those databases that is available to Ameritech. If the Commission does not delete Section 16.3, Section 16.3 should be modified as recommended by the Joint CLECs in their BOE at 15.

Staff, however, still maintains its position in the Initial Brief -- that Section 16.3 should be deleted. Based on the findings stated in the Proposed Order, Section 16.3 states the following:

Ameritech-IL shall make available to CLECs all the functionality for analyzing data in its ~~backend systems and~~ databases listed in 16.1. Such functionality shall include but not be limited to generating reports and inquiries.

As Staff argued in its initial brief, this provision of the Interim Tariff is essentially repetitive of Staff's proposed Section 16.1. Staff modified Section 16.1 in its *Surresponse on Rehearing* in Docket No. 00-0393, and provided the following revisions:

16.1 Ameritech-IL shall make available to CLECs ~~read-only, mediated, direct and unfiltered gateway access to its OSS databases and backend systems that contain loop qualification information that is available to Ameritech, Ameritech's affiliates or any employees of any of them. This information shall be provided in whatever form or format that information is made available to Ameritech, its affiliates or any of its employees. , which at minimum shall include, but not be limited to LFACS, FACS, TIRKS, ARES, TMM, SWITCH, SWITCH DLE, SOAC, ACIS, WFA/C, WFA/DO, WFA/DI, LMOS and LEAD/LEIS.~~

Surresponse on Rehearing of Staff, at 6-7.

The last sentence of Staff's proposed Section 16.1 is the equivalent of Section 16.3. Staff's proposed Section 16.1 above ensures that Ameritech will provide information to a CLEC in the same form or format that it provides it to itself or its affiliates, thereby providing the CLEC with the same information it would be provided under Section 16.3. Accordingly, Section 16.3 can be deleted.

5. TECHNICAL AND ECONOMIC FEASIBILITY SHOULD NOT BE DEFINED IN THE INTERIM TARIFF

Covad argues that the Commission should adopt its definitions of technical and economic feasibility. Covad BOE at 6. Staff disagrees with Covad. The Proposed Order correctly decided that technical and economic feasibility should not be defined in tariffs, and that the "determination must be made on a case-by-case basis." *Proposed Order* at 73.

6. OC3 OCD PORT PRICES SHOULD NOT BE SET AT DS1 OCD PORT PRICES

Covad continues to argue that it needs to purchase OC3 OCDs at DS1 prices in its BOE. The main thrust of their argument is that CLECs will initially have small customer volume and shouldn't have to pay for thirty (30) times the capacity that they are using. Covad BOE at 8-9. Covad concludes that Ameritech's proposed pricing is a barrier to entry and that the Commission should use its power under Section 13-801(g) of the PUA to set interim rates at DS1 levels. *Id.* The Amendatory Order on Rehearing

at 3-4 (Oct. 16, 2001) finds that references to DS1 were to be removed from Sections 5.1.1, 5.1.2, and 5.6.3 since the parties agreed that DS1 is not to be provisioned at this time. In reviewing the tariff language, Staff recommended that all references to DS1 OCD pricing be removed. Staff IB at 8. As Covad argues, the record may lack sufficient justification for setting DS1 prices at thirty times the capacity the CLEC will be using the port. However, Staff ultimately agrees with the finding of the Proposed Order -- that there is insufficient evidence justifying DS3 OCD port prices at DS1 levels. Additionally, this issue may be premature since, as discussed above, Ameritech cannot provision DS1 OCD ports at this time. Finally, Covad's arguments may violate the FCCs requirement that unbundled network elements ("UNEs") be set at TELRIC rates.

Accordingly, the Proposed Order is correct and should remain unchanged.

7. ACCESS TO FEATURES/FUNCTIONS NOT YET COMMERCIALY AVAILABLE

Covad takes exception to the Proposed Order's finding that the Special Request Process simply recognize two new products, and that "new functions or features that are not commercially available at the time the request is made" be removed. Joint CLECs BOE at 10-11; see Proposed Order at 72. Covad argues that the ALJ's statement of the issues at the commencement of this rehearing did not limit the scope of the special request process, and that the parties provided testimony that envisioned the Special Request applying to features/functions not yet commercially available. Joint

CLECs BOE at 10-11. Staff disagrees with the Joint CLECs interpretation of the Proposed Order. On its face the Proposed Order is a little unclear, however, Staff's understanding of the Proposed Order's finding on this issue shows it to have little to no effect on the Special Request Process.

Staff interprets the Proposed Order's findings differently than the Joint CLECs. Staff interprets the Proposed Order to accept Covad's Special Request Process, but to limit its use to requests for new products (products in addition to G.Lite and G.SHDSL), and features/functions that are commercially available at the time of request. The proposed Order also permits the special request process to be used for new products approved through the Special Request Process (which are undetermined at this time), and for features/functions that are commercially available at the time of request for G.Lite and G.SHDSL. See *Proposed Order* at 72.

What is unclear about the Proposed Order, is that it could be read to limit the Special Request Process to features/functions of G.Lite and G.SHDSL, and not allow requests for new products. If the CLECs interpretation of the Proposed Order is correct, Staff would agree the Proposed Order inappropriately limits the Special Request Process. As stated above, Staff interprets the Proposed Order to still allow new products (products in addition to G.Lite and G.SHDSL) to be ordered through the Special Request Process. Although Staff's initial proposal did not envision this limitation, based on Staff's understanding of the Proposed Order, as set forth above, Staff agrees with this finding of the Proposed Order, if the term "commercially available" is defined in the order, as the manner proposed by Staff below.

Staff's proposed Special Request Process avoids the ALJ's concern with Covad's category of products that are not commercially available, since Staff's categories are not based on technical criteria, like Covad's categories are. Covad IB at 8. Staff's categories are based on the product that is currently, or soon to be, available from a vendor. See Staff BOE at 1-6. In other words under Staff's proposal a new product would be considered available if a vendor had developed a product and tested it and made it available for an ILEC to purchase. Therefore, Staff's proposal is easily adapted to the Proposed Order's modification, as discussed in Staff's BOE at 7-10.

Commercially Available

Staff proposes that the Commission state in the Order, what the parties already agreed to as the definition of "commercially available" – a product available from the vendor for an ILEC to deploy. Tr. at 407 (Ameritech witness Boyer), and Tr. 558 (Covad witness Carter). Although the parties representatives agreed to the meaning of this term during cross-examination, Staff urges the Commission to define it in the Order to prevent any further confusion in the interpretation of this Order. This definition should be provided as long as this limitation remains in the Order, regardless which parties Special Request Process is ordered into effect.

Accordingly, if Staff's interpretation of the Proposed Order is correct, then it agrees with the Order's findings, with two modifications. First, the definition of the term "commercially available" must be included; second, that Staff's Special Request Process be accepted, since, as set forth in its BOE, it proposes timelines that are more

reasonable than the Joint CLECs. Additionally, it prevents the open-ended process that is of concern in the Proposed Order, it accounts for Ameritech's AFU process, and it can be easily adapted to the changes of the Proposed Order. See Staff's BOE for proposed language for the Commission Analysis and Conclusion section.

If Staff's interpretation of the Proposed Order is incorrect, then Staff urges the Commission to adopt its position and language for the Proposed Order and Special Request Process, or in the alternative, modify the language to clearly state the limitation in question and provide a surreply round for the parties to provide comments.

8. CONCLUSION

For the foregoing reasons, Staff requests that the Commission accept Staff's recommendations in their entirety as set forth herein.

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Respectfully submitted,

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